INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional amendment involved	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:

On Lee v. *United States*, 343 U.S. 747	7
Silverman v. *United States*, 365 U.S. 505	8
Stockman v. *United States*, 8 F. 2d 211	8

Constitution:

United States Constitution, Fourth Amendment	2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 125

VINCENT JAMES FINAZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-20) is reported at 288 F. 2d 175.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1961 (Pet. App. 21). A petition for rehearing was denied on April 4, 1961 (*ibid.*). On April 25, 1961, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to

and including June 1, 1961. The petition for a writ of certiorari was filed on May 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in not excluding, as the product of an allegedly unreasonable search and seizure, testimony as to admissions made by petitioner at his place of business, overheard on a short-wave radio, where no objection was made at the trial to the method by which such admissions were overheard.

2. Whether certain testimony admitted at the trial was hearsay.

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution provides as follows:

> The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Michigan on all three counts of an indictment charging illegal purchase, receipt, concealment, possession

and transfer of narcotics. He was sentenced to concurrent terms of imprisonment for five years on each count (R. 2-3, 162, 169). The court of appeals unanimously affirmed. The evidence may be summarized as follows:

1. The principal government witness was Andrew Bottancino, who at the time of the trial had pleaded guilty to a federal narcotic offense but had not been sentenced. Bottancino was a former narcotics addict and had served a prison sentence for narcotics violations. At the time of the events here involved, he was employed as a salesman and watchmaker in a Detroit pawn shop (R. 9, 16, 40-41).

Bottancino testified that, prior to the date of the offenses (May 28, 1959), he had received several telephone calls from an unidentified man who wanted him to dispose of two kilos of heroin. Bottancino ascertained that acquaintances of his, Percy and Marion Jackson, might be interested in buying it and arranged a meeting with the anonymous caller (R. 11, 13-16, 19-21). After Bottancino waited at the agreed meeting place for a short time, a 1957 or 1958 Chevrolet drove up. He recognized the driver as petitioner, whom he had known about ten years before, and who identified himself as being the person who had made the calls (R. 21-22, 9). They discussed details of the proposed transaction, including the requirement of a sample by the prospective purchasers and whether it was safe to deal with them (R. 22-23).

Petitioner drove Bottancino to the Jackson residence and gave him a sample of the narcotics. Bottancino

talked with the Jacksons and a third person present who, they said, was going to finance the transaction. This person was a federal narcotics agent named Lewis (R. 26-29, 33). Bottancino testified that he delivered the sample for testing. Lewis took the sample, left the house for half an hour, and returned. Bottancino also testified as to statements he made to Lewis at that meeting—chiefly that the price was $5,500. Bottancino then went back to petitioner's car and informed him that the people he was dealing with objected to the quality of the sample and would not buy unless the price was cut. Petitioner refused to do this (R. 29-36).

On cross examination, Bottancino testified that he had stopped in petitioner's grocery store a few times after May 28 and bought things for the family. On one occasion, they talked about how bad the deal was. Bottancino tried to get some more heroin from petitioner, but petitioner turned him down, saying that he was making a good living. Bottancino also told petitioner about his arrest and warned him to be careful (R. 59-63). On redirect examination, Bottancino testified that he had a small radio transmitter in his belt when he went to petitioner's shop (R. 72-73).

2. Several witnesses corroborated the testimony of Bottancino:

Agent Lewis testified that he met Bottancino at the Jackson residence (R. 82-84), and gave an account of the meeting similar to that given by Bottancino. Lewis' account of his side of the conversation corresponded with Bottancino's statement of what

he had said (*supra*, p. 4). Lewis testified that he left the Jacksons' place for a short time, in order to deliver the sample of heroin to Agent Panich for field testing. The test showed a positive reaction for the presence of an opium derivative. Lewis returned and reported that the sample was weak and that the price was too high (R. 85-86). There were no revenue stamps on the sample (R. 87). A portion of the powder was retained for laboratory testing (R. 89), which showed heroin of 81.5% purity (R. 112-113). The Jacksons knew that Lewis was a narcotics agent (R. 90).

Agent Panich testified that he field tested and got a positive reaction on the sample given to him on the evening in question by Agent Lewis (R. 95). Later he saw Bottancino come out of the Jackson residence and get into a 1956 or 1957 Chevrolet driven by a stocky, dark-haired man (R. 93-94). Agent Nodolski also testified to the latter event, describing the driver of the Chevrolet as a dark-haired man who appeared to be an Italian (R. 100-101).

Agents Marquardt and Adamski testified that on July 13, 1959, they parked their car outside the F and M Bake Shop in Detroit and listened in by short-wave radio on a conversation between petitioner, who was operating the shop, and Bottancino, who had a radio transmitter concealed on his person. Petitioner objected to the testimony of Marquardt on the ground that he could not know who was talking with Bottancino (R. 116-118) and on the further ground that all the conversation could not be heard, due to background noise (R. 119-120). The objec-

tions were overruled. The two agents testified that they could see what occurred through the glass front of the shop. When Bottancino went in, he addressed the petitioner as "Jimmie." He told petitioner that he had received a call from his people the other night and that the stuff petitioner got for them was "dynamite." Most of the conversation was inaudible for a period of ten to fifteen minutes. As Bottancino left, he asked petitioner to let him know if he got any more stuff. Petitioner replied with some profanity that he did not fool around with it any more, as he had a nice business there and didn't have to (R. 119-121, 124-127).

Detective Areeda of the Detroit Police Department testified that on December 28, 1959, Bottancino, again equipped with a short wave transmitter, went into petitioner's bake shop. Areeda overheard the conversation from across the street. Bottancino told petitioner that he got "busted" on the sample which the latter had given him, and that there was a "Fed." in the closet. Petitioner asked if Bottancino had mentioned him and said, "If they ask me anything about it, I don't even know you." (R. 132-134). Agent Vernier, who was with Areeda, corroborated this account (R. 136-141).

ARGUMENT

1. Petitioner's principal contention (Pet. 11-13) is that the action of the law enforcement officers in listening, through a short-wave radio, to conversations in petitioner's place of business between himself and Bottancino constituted an unreasonable search

and seizure in violation of the Fourth Amendment; and that the testimony about those conversations should have been excluded. But petitioner, although represented by retained counsel, made no objection to the introduction of the evidence on this ground. His objections, made only to the testimony of one agent about the overheard conversation, were that the officers who heard it could not know to whom Bottancino was talking; and that, because of background noise, all of the conversation was not audible (see the Statement, *supra*, p. 5). The district court was under no obligation *sua sponte* to exclude evidence on a ground not raised by the objector—particularly since, as we show below, there was no basis for exclusion on such ground.

If the Fourth Amendment issue is properly presented on this record, *On Lee* v. *United States*, 343 U.S. 747, is completely dispositive of petitioner's contention. This Court there held (p. 754) that there was "no violation of the Fourth Amendment" when a federal undercover agent who had a radio transmitter concealed on his person entered Lee's laundry and engaged him in conversation during which Lee made incriminating statements overheard on a receiving set by another agent outside the building. Here, as in *On Lee*, "no trespass was committed" when Bottancino "entered a place of business with the consent, if not by the implied invitation, of the petitioner," and his "conduct * * * did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amendment" (343 U.S. at 751-752). In the instant case, "the eavesdropping

had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area" (*Silverman* v. *United States*, 365 U.S. 505, 510).

2. Petitioner further contends (Pet. 15-16) that the testimony of Bottancino and Lewis about their attempted negotiation of a purchase of heroin was inadmissible hearsay. Their testimony was not hearsay, however, but direct evidence as to what each witness himself did and said; neither testified as to what the other had said.

The fundamental objection to hearsay is that it permits the introduction in evidence of the statement of a third person without an opportunity to cross-examine such person. That situation was not present here. Both participants in the conversation were present in court and subject to cross examination. Actually, what was said was of little significance. The important point was that Bottancino presented the sample which petitioner had given him and the agent accepted it for the purpose of testing it. The conversation tended to clarify the events which took place and was thus admissible as part of the *res gestae*. See *Stockman* v. *United States*, 8 F. 2d 211, 212 (C.A. 9). Petitioner's point that telling one side of a conversation implies what was said in reply is not pertinent in this case, since both participants testified directly as to what each said and did.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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